

## Options to change the constitutions

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The event of the year, as the media have labeled the national referendum after the people's initiative that took place on April 16, 2000, has logically transformed into problems of implementation of referendum results by means of amending the previously untouched Constitution. The challenge has been increased by the Constitutional Court's judgement that all of the provisions endorsed by Ukrainian voters at the referendum were binding.

Although there had been some suggestions that the referendum could have merely advisory impact, they had to be dropped after the announcement of the Constitutional Court's verdict: the issues, approved by the national referendum after the people's initiative, specified in paragraphs 2, 3, 4, and 5 of Article 2 of the Decree of the President of Ukraine On Proclaiming the National Referendum after the People's Initiative are binding for consideration and adoption of decisions in the order specified by the Constitution of Ukraine. Specifically, the verdict referred to Part XIII, Introducing Changes to the Constitution of Ukraine and related laws. In case the referendum produced positive response to the issues, a draft bill on amending the Constitution could be introduced to the parliament either by the President of Ukraine or at least one third of the parliament's constitutional composition, or 150 MPs. The verdict was final and could not be challenged.

Five days after the official announcement of the referendum results that demonstrated overwhelming support for the changes proposed by the initiators, members of the parliament received a draft, proposed by the President. For the sake of strict implementation of the decisions adopted by the national referendum after the people's initiative, <...> given the necessity of the soonest implementation of the volition of the citizens of Ukraine for making changes to the Fundamental Law of Ukraine [I] solicit consideration of this draft bill as urgent, the head of the state wrote. Leonid Kuchma addressed the parliament with a request to approve the proposed amendments to the Constitution during this session and adopt the law at the beginning of the next (6th) session in September 2000. In case the parliament fails to adopt this draft bill in the due term, the President's address read, he, as the guarantor of the observance of the Constitution and citizens' rights, would have to take adequate measures to provide for implementation of the decisions adopted at the referendum after the people's initiative. The text did not specify what exactly the adequate measures could be.

The draft, proposed by the President, provided for implementation of three major changes supported by voters at the April 16 referendum. The fourth issue, the establishment of a bicameral legislature, was not reflected in the document - at least for now. Simultaneously the President sent letters on implementation of the referendum results to Speaker Ivan Plushch and Prime Minister Victor Yushchenko. To facilitate the implementation process, the President established a commission for drafting bills related to the referendum issues, including the one providing for a new, bicameral legislature. Yet, so far the issue of thorough transformation of the parliament has been left till later with no explanations given as to the reason for such a selective approach to declaratively binding results. Meanwhile, the draft proposed amending paragraph 1 of Article 76 of the Constitution to reduce the number of MPs from 450 to 300, and Article 80, to withdraw the provision that members of the parliament may not be brought to trial on criminal charges, detained or arrested without the agreement of the Verkhovna Rada.

Furthermore, the President proposed to amend Article 90 of the Constitution with a new paragraph 3 to give the President the right for early dissolution of the Verkhovna Rada if it fails to form a steady parliamentary majority within one month or if it fails to approve a draft budget law, prepared and duly submitted by the Cabinet of Ministers, within three months. Another proposal was to amend paragraph 8 of Article 106 of the Constitution (stipulating the possibility to dissolve the parliament should it fail to gather for session within 30 days) with the words and in other cases envisaged by the Constitution of Ukraine.

Commenting on the draft and its likely future in the parliament, the President argued that adoption of the draft was a matter of honor for Ukraine in general and the legislative branch. Yet, the parliamentary debates on the draft are unlikely to go on smoothly. Obviously, the most vigorous opposition of MPs will be caused by the provisions that open additional possibilities for the President to dissolve the parliament. A number of MPs, both left-wingers and representatives of the pro-presidential majority, argue that the notion of a permanently functioning parliamentary majority is rather vague and lacking an accurate legal definition. Commenting on the problem, Oleksandr

Lavrynovych, MP, noted that the given formulation of the majority can hardly claim [to represent] a constitutional text (Den, April 26, 2000).

Yet, the problem appears to be even deeper-rooted. Analysis of the provisions outlined in the draft suggests that the document represents an attempt of mechanical implantation of the referendum results to the body of the Constitution - word by word, no interpretations, extrapolations or options. Yet, then the selective nature of the President's proposals remain obscure and raises a logical question: why the issue of creating a bicameral parliament has been ignored by the draft? The fact that the issue was left outside the proposed draft allows to speak about certain uncertainty of its positions: one cannot freely implement (even if the supreme legislative authority wishes so) three fourths of the people's will. The referendum results must be taken into account and implemented either 100 percent, or there must be clear motivation [of the reason] why one issue, and not two or three, is left out, argues Dmytro Tabachnyk, MP, pointing to the fact as the principle drawback of the President's draft bill (Den, May 20, 2000).

It is hard to say whether the issue of creating a bicameral legislature and its implementation will be treated in the process of the constitutional marathon. From time to time, one can hear suggestions about the consultative nature of this very issue and the related changes. For instance, Yuri Levenets, one of leading ideologists of the Democratic Union that actually contributed largely to initiating the referendum, publicly stated that he saw nothing terrible if the question was asked in the consultative mode and the answer was yes. But working out the mechanisms is a different issue (Den, May 6, 2000). Discussing the judgement of the Constitutional Court that all of the referendum results were binding for consideration by the Verkhovna Rada, he argued that the Constitutional Court gave no implementation procedure for the fourth question... It is the parliament that must propose a procedure for solving the problem (Den, May 6, 2000).

Members of the parliament responded almost immediately with their own version of the implementation methods. An alternative draft for making amendments to the Constitution was proposed by former Minister of Justice Serhiy Holovaty and leader of the Left Center faction Oleksandr Moroz and supported by 152 MPs. The referendum did take place. Notwithstanding [one's] attitude to the referendum, the received results are a fact, a matter for consideration by the Verkhovna Rada, the authors wrote in the introductory note to the draft Law of Ukraine On Changes to the Constitution of Ukraine after the Results of the National Referendum. The politicians who created and endorsed the alternative draft had repeatedly spoken highly negatively about the referendum as such and argued they had sufficient evidence of falsification of the expression of the people's will (see Declaration of the Left Center block, May 10, 2000). The document reflects their general opposition to the referendum and its possible consequences, and the sense of threat to the parliament. The introductory note to the draft explains that not only the new edition of articles of the Constitution should reflect the formulations, adopted at the referendum, but also their legal mechanisms... The provisions of the proposed alternative draft seek to broaden the parliament's powers significantly. The establishment of a bicameral legislature, the key theme of the document, serves as the basis for a number of changes proposed for the Fundamental Law. Among other things, the draft proposes to amend Part IV of the Constitution, and to rename the part from Verkhovna Rada of Ukraine to Parliament of Ukraine. According to the draft, Article 75 should read: the only body of legislative power in Ukraine is the Parliament of Ukraine. It consists of two chambers: the Verkhovna Rada of Ukraine and the Senate of Ukraine. Proposed amendments to Article 76 stipulate that the constitutional composition of the Verkhovna Rada of Ukraine [is] three hundred people's deputies who are elected on the basis of general, equal and direct suffrage through secret vote for the term of four years.

The alternative draft differs radically from the President's draft in its vision of the way of amending Article 80 of the Constitution, i.e., one of the most controversial articles that provides MPs with broad immunity to prosecution. According to authors of the alternative draft, withdrawal of paragraph 3 of the article alone will mean that under its paragraph 1 a deputy's immunity will become absolute. Instead, they proposed their own recipe for solving the problem: paragraph 3 of Article 80 should stipulate that people's deputies and senators of Ukraine may not be charged with criminal offence, detained or arrested without the consent of the Supreme Court of Ukraine. Yet, the formulation sounds unexpected in the context of the referendum issues: none of them mentioned the Supreme Court, and, therefore, the idea of involving the Supreme Court of Ukraine in deciding whether an individual MP should enjoy immunity to prosecution is likely to cause keen objections.

Other provisions of the document also indicate that it targets substantial increase in the parliament's control over the government: ... the deputy majority, no later than within one month after being formed, solves the issue of appointing the Prime Minister and introduces the nomination for consideration to the Verkhovna Rada of Ukraine. According to the current Constitution (Part VI, Article 114), Prime Minister is appointed by the President of Ukraine with approval of over half of the constitutional

composition of the Verkhovna Rada of Ukraine. In fact, this is not the of the government question for the MPs. Authors of the draft propose that instead of providing agreement to the appointment of the Prime Minister of Ukraine by the President of Ukraine (Article 85) the Constitution should be amended to give the parliament the authority of appointing and dismissing the Prime Minister of Ukraine, appointing and dismissing, following proposals of the Prime Minister of Ukraine, of members of the Cabinet of Ministers.

The proposed changes also refer to Article 90 of the Constitution. According to the referendum results, MPs have to agree that the President of Ukraine also may halt the authority of the Verkhovna Rada of Ukraine should the Verkhovna Rada of Ukraine fail to form a permanently functioning deputy majority within one month, or should it fail, within three months, to approve the State Budget of Ukraine, prepared and submitted by the Cabinet of Ministers of Ukraine in a set order. Instead of a parliamentary majority, mentioned in the referendum ballots, the draft refers to a deputy majority, as its authors argue that the majority cannot be formed of two chambers together. In general, the MPs proposed changes that would affect over 40 articles of the current Constitution. Chances that most of those changes may be implemented in the near future are scarce, as the procedure of amending the Constitution requires at least 300 votes of MPs. Most likely, Oleksandr Moroz and Serhiy Holovatyι can expect to receive no more than 152 votes of MPs who initially endorsed the document, and even that may be problematic, given the reports that some of the MPs subsequently called off their signatures under the draft. Meanwhile, their opponents and supporters of the other draft will also face a challenge of the shortage of votes. Therefore, there are real reasons for a lasting confrontation between different forces in the parliament and between the parliament and the President.

In fact, authors of the alternative draft do not limit their efforts to merely proposing their version of implementation of the referendum results. They believe the process should include adoption of a number of bills, primarily a new law on elections to the lower chamber, the Verkhovna Rada, based on the proportionate system, and a law on elections to the Senate that would regulate election of 120 to 150 senators for majoritarian constituencies. A number of provisions, proposed by the authors of the alternative draft, go far beyond the provisions approved at the referendum.

There is a fundamental difference between the presidential draft bill and the one proposed by the MPs. While the presidential draft indirectly aims at increasing the authority and the role of the president of Ukraine, enhancing the president's influence on the parliament, the MPs' draft proposes changes that would have an opposite result. It is still a question whether these diverse agendas can be incorporated into a document representing a compromise between the two branches. Similarly, there may be lasting debate as to which of the two drafts meets the requirements of Articles 157 and 158 of the Constitution. Yet, the key players to address these issues at this stage of the referendum marathon are not as much MPs or the President and his administration, as members of the Constitutional Court. On May 11, 2000, when the parliament was unable either to adopt or reject either of the drafts, both of them were sent to the Constitutional Court, for according to the Constitution draft amendments to the Fundamental Law can be debated by the parliament only after they are equipped with the Constitutional Court's conclusions about their legitimacy. The verdict can be expected at least after four weeks. Meanwhile, the national referendum, presumably initiated by Ukrainian voters eager to upgrade their legislature, has been gradually transforming into a lasting and dramatic dilemma with all possible consequences that may damage the legitimacy of actions of both the legislature and the executive branch.